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No. 81-2129

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SYDNEY M. EISENBERG,

Petitioner

vs.

GEORGE D. CROWLEY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Ruled As A Matter Of Law That Respondent George Crowley Filed A Motion After Verdict In The Petitioner's Federal Tax Case In A Timely Manner?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to post-judgment motions.

2. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Rendered Erroneous Instructions To The Jury? Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to instructions.

3. Did The Trial Court Violate Petitioner's Right to Due Process Of Law Under The United States Constitution When It Purportedly Rendered A Verdict Form Containing Assumed

Facts In Dispute And Therefore Invaded The Province Of The Jury?

Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to verdict form.

4. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Refused To Adjourn Motions After Verdict Until A Transcript Could Be Prepared?

Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to adjournment of motions.

5. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Allowed Respondent's Counsel To Refer To Petitioner As Being Guilty Of Murder In The Presence Of The Jury?

Neither The Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to an alleged improprietous statement.

6. Did the Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Purportedly Denied Petitioner His Constitutional Right To Confront Witnesses Testifying Against Him?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to confrontation of witnesses.

7. Did The Trial Court Violate Petitioner's Right To Due Process Of Law Under The United States Constitution When It Refused To Over Turn The Jury Verdict Finding No Malpractice?

   Neither the Trial Court nor the Appellate Courts were presented with or passed upon any constitutional issue with respect to purported acts of malpractice.

8. Did the Supreme Court of the State of Wisconsin Violate Petitioner's Right To Due Process Of Law When It Refused To Review the Decision Of The Wisconsin Court of Appeals, Said Decision Having Been Authored By A Justice Against Whom Petitioner Filed A Request for Substitution?

The Wisconsin Supreme Court was never presented with nor passed upon any constitutional issue with respect to a substitution request.

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JURISDICTIONAL STATEMENT

The respondent contends that jurisdiction for granting of certiorari in the instant case is not founded in Title 28, §1257 (3) of the United States Code nor in any other authority recognized by law.

CONSTITUTIONAL PROVISIONS

Respondent contends that the privileges and imunities, citizenship, equal protection, apportionment of representatives, disqualification of officers, public debt and enforcement provisions of the United States Constitution are inapplicable to the case at bar and have not been raised by the petitioner in argument or by reference.

STATEMENT OF THE CASE

This action was commenced by the respondent, George D. Crowley, to recover attorney fees owing from his representation of the petitioner, Sydney M. Eisenberg, in a federal criminal trial where it was found

that Mr. Eisenberg was guilty of three (3) counts of willfully filing a false income tax return. The petitioner counter-claimed against the respondent for legal malpractice.

A jury trial was commenced in Milwaukee County Circuit Court on November 26, 1979, before the Honorable James P. Fiedler. On December 5, 1979, the jury found for the respondent on his claim for attorney fees and against the petitioner on his counter-claim.

On March 7, 1980, motions after verdict were argued before the Honorable James P. Fiedler. (A13-15) The Court heard the arguments of counsel, considered the evidence offered at the trial and determined that there was credible evidence to support the verdict answers, with the exception of the answer to Question 1a which was amended by stipulation of counsel from $10,000 to $7,000. Judgment was ordered against the

petitioner on march 17, 1980, in the sum of $14,838.00 with interest at the rate of 7% per year, together with costs and disbursements. The counterclaim of the petitioner was dismissed on the merits. (A17-18) From this judgment the petitioner appeals.

The petitioner contended that his retainer agreement with the respondent was for a fee of $20,000 to cover trial and appeal. If an appeal was necessary, $3,000 additional would be paid for the printing of briefs.

The respondent testified that the retainer agreement called for a $30,000 fee to cover the trial. (R., 11/27/79, 37). He was also to be paid his expenses in addition. (Id. at R. 38). The respondent testified that the agreement for post-trial representation called for an hourly rate and that Mr. Eisenberg agreed to this. (Id. at R. 43).

The petitioner claimed Mr. Crowley had committed malpractice by his waiving a jury

without consultation with him; that Mr. Crowley had failed to properly investigate the case; that he refused to allow the petitioner to testify; that he failed to call any witnesses for the defense; and that he filed his post-trial motions late.

Mr. Crowley and his associate, Mr. Manning, both testified and refuted all of petitioner's contentions. Mr. Manning testified that a waiver of a jury was discussed with Mr. Eisenberg, and that Mr. Eisenberg agreed to a trial before the Court. (R., 11/26/79, 37, 79-80). Mr. Eisenberg signed a jury waiver in open Court. (Id. R. 114).

Mr. Manning testified that the reason no witnesses were called by the defense was that the government had called all the pertinent witnesses and the defense had the opportunity to question them through cross-examination. (Id. R. 117). Both Mr. Crowley and Mr. Manning testified that they had investigated the case and interviewed witnesses. (Id. R. 67-68; 11/27/79, 51-53).

The respondent also refuted Mr. Eisenberg's claim that he was not permitted to testify. Mr. Manning gave his reasons why he did not want Eisenberg to testify. (R. 11/26/79, 106-107). He also testified that this strategy was discussed with Eisenberg. (Id., 92-95). Mr. Crowley supported Mr. Manning's testimony and said that he had discussed with Eisenberg whether he should testify and it was agreed that Eisenberg would not take the witness stand. (R. 11/27/79, 68).

Mr. Manning testified that after the government rested its case there was a recess. When Mr. Crowley and Mr. Manning returned to the Courtroom, Mr. Eisenberg was standing before the bench and was telling the judge that he was ready to testify and that the Court need not wait for his attorneys. (R. 11/26/79, 81-82). Mr. Manning said that Eisenberg did this to give the Court an impression of candor without being

subjected to cross-examination. (Id. 109) (R. 11/27/79, 19).

At the conclusion of the government's case in the criminal trial, the defense made a motion for a judgment of acquittal, which was denied. The defense put into evidence various documents, rested, and again made a motion for a judgment of acquittal. Mr. Manning testified that after the first motion the Court had to view the evidence in a light most favorable to the prosecution. After the second motion the standard became one of beyond a reasonable doubt. (Id. 7-8). Both Stanley Gimbel and James Shellow, two Milwaukee attorneys with extensive experience in federal criminal tax matters, supported this strategy used by Mr. Crowley. (R. 12/4/79, 75-76, 87-88, 93-94).

The petitioner also claimed that Mr. Crowley failed to timely file post-trial motions. The motion referred to was a motion for a new trial based on newly dis-

covered evidence. Mr. Manning testified that this new evidence was not discovered until approximately two weeks after Eisenberg had been found guilty. (R., 11/26/79,89-90). Mr. Manning testified that the federal trial judge ruled that the motion must be viewed under a more stringent standard than would be required had the motion been brought within the seven days of a finding of guilt. The Trial Court in this action, with no evidence available to the respondent within seven days of Mr. Eisenberg's being found guilty ruled as a matter of law that the motion was timely filed.

As hereinbefore stated, the jury, after hearing all of the evidence, arguments of counsel, and argument from Mr. Eisenberg, found for the respondent on his complaint and against the petitioner on his counterclaim.

The judgment herein was reviewed by the Wisconsin Court of Appeals and affirmed in its entirety and judgment entered July 21, 1981 (A1-12)

Mr. Eisenberg sought a discretionary Petition for Review before the Wisconsin Supreme Court which was denied by order entered December 7, 1981 (A. 16). From the denial of Petition for Review Mr. Eisenberg has filed the instant Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENTS

Petitioner herein maintains that the Trial Court, Appellate Courts and respondent denied him Due Process of law by various acts during the course of litigation of the action below and subsequent proceedings. Respondent will argue that the petitioner has not properly raised a federal question so as to confer jurisdiction upon the Court. The petitioner failed to preserve any constitutional argument at the Trial Court level and accordingly would be precluded from review by Writ of Certiorari before the United States Supreme Court. Mr. Eisenberg neglected to preserve many of the issues in any form by refusing to object,

preserve the record, or move for mistrial. The Court of Appeals for the State of Wisconsin refused to consider any of Mr. Eisenberg's arguments in that they were waived at the trial level. Petitioner requests the Court to consider now, through Writ of Certiorari, purported issues of constitutional magnitude without having presented the same to the Courts below.

Respondent will further demonstrate that the allegations of Due Process denial are substantively without merit, assuming for the sake of argument that they are properly before the Court. The jury verdict below was founded upon adequate and independent grounds and any purported errors did not result in a denial of the petitioner's Due Process rights. The respondent will attempt, by reference to the decision in the Trial Court, post-judgment motions, the record, and other exhibits to illustrate that the averments by petitioner are wholly without

merit. Respondent herein will request the Court, periodically, to disregard a substantial portion of petitioner's argument in that it is unsupported in law and by reference to the record.

ARGUMENT

I. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT RULED AS A MATTER OF LAW THAT RESPONDENT GEORGE CROWLEY FILED A MOTION AFTER VERDICT IN THE PETITIONER'S FEDERAL TAX CASE IN A TIMELY MANNER?

Petitioner argues that the Trial Court erred in ruling as a matter of law that respondent's motions were filed in a timely manner. Although petitioner attacks both respondent and the Court, personally and substantively, no references to the record are made. Petitioner occasionally quotes from what may be the record in the trial below but fails to cite its appropriate page. The majority of the "argument" is fraught with unsupported averments and should be disregarded: e.g., "This request was made when the Court appeared to be sympathetic to the taxpayer's statement to the Court letting the judge know he wanted an opportunity to take the stand and explain the facts." (Pet.Br. 25) ";. . . Mr. Crowley procrastinated until the seven (7) days were up and over." (Pet.Br. 26) "Mr. Crowley was simply in a hurry to leave Milwaukee." (Pet.Br. 28). The Court has been presented

for the first time with an unsupported claim of constitutional dimension.

The Wisconsin Court of Appeals correctly ruled that "to preserve a right to appeal, one must first raise the issue in the Trial Court." (A.3) The failure to do so "constitutes a waiver of the objection." (A.3) Terpstra v. Soil Test, Inc., 63 Wis.2d 585, 594, 218 N.W.2d 129, 134 (1974). The Wisconsin Supreme Court has repeatedly ruled that no evidentiary ruling is reviewable as a matter of right without first being raised in motions after verdict, Michalski v. Wagner, 9 Wis. 2d 22, 100 N.W.2d 354 (1960), Dutcher v. Phoenix Ins. Co., 37 Wis. 2d 591, 155 N.W.2d 607 (1968). The allegation of a due process violation was never raised at the trial level. Moreover, petitioner failed to preserve such issue at post-judgment level. (A13-15) With respect to the timeliness issue, petitioner failed to object under any grounds, either at trial or through post-judgment motions. No constitutionally couched argument has ever been put forth until the filing of the instant Petition for Writ of Certiorari.

The United States Supreme Court has had a correlative approach in viewing constitutional issues raised on appeal. Only constitutional issues raised in the lower Court shall be considered by the Supreme Court on appeal. Shelley v. Kraemer, Mich. & Mo., 334 U.S. 1, (1948), State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 154 (1945) Re-hearing Denied 444 U.S. 1088 (1979, Fuller v. Oregon, 471 U.S. 40 (1974), Cardinal v. Louisiana , 394 U.S. 437 (1969, Monk v. New Jersey, 398 U.S. 71 (1970).

Accordingly, respondent maintains that no federal question is properly before the Court. The Supreme Court has not in the past, and should not now, review that which the Court below did not decide. Walters v. City of St. Louis, 349 U.S. 231 (1954).

In no way does petitioner demonstrate a violation of due process rights nor does he present any evidence of resultant harm. He cites no case law or evidentiary support to lend credence to his bold faced assertion. The Supreme Court will not rule upon issues of purported constitutional dimensions which are hypotheti-

cal. Ashbury Hospital v. Cass County, N.D., 326 U.S. 207 (1945) Further, a mere assertion of a claim of federal question, as in the case at bar is inadequate to confer jurisdiction upon the Court. U.S. Fidelity & Guaranty Co. v. State of Oklahoma, 250 U.S. 111 (1919), Hamblin v. Western Land Co., 177 U.S. 531 (1893), and Thomas v. Iowa, 209 U.S. 259 (1908). The denial alleged to have occurred must be distinct and positive in order to support jurisdictional sufficiency. Michigan Sugar Co. v. Michigan, 185 U.S. 112 (1902).

The United States Supreme Court has refused to review State Court decisions which are founded upon independent and adequate state grounds, even when the judgment decided federal questions. That principal applies to cases involving both substantive and procedural grounds. Henry v. State of Mississippi, 379 U.S. 443 (1965) Re-hearing Denied 380 U.S. 926, On Reversal 174 So.2d 348, Motion Denied 381 U.S. 908. The instant action was decided upon independent and adequate grounds. The jury determined that petitioner committed

no act of legal malpractice. In Wisconsin the standard for review of a jury verdict;

> "Is that it will not be upset if there is any credible evidence to support it. The evidence will be reviewed in the light most favorable to the verdict." Meurer v. ITT General Controls, 90 Wis.2d 438, 450-451 280 N.W. 2d 146 162-163 (1979)

The Court of Appeals in the case at bar, and as affirmed by the Wisconsin Supreme Court ruled,

> "Under the above standards of review, (supra) we are satisfied that there is ample credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed." (A. 11-12)

No federal question was presented to the Trial or to the Appellate Courts. The jury verdict was found to be adequate and accordingly no procedural or substantive issue with respect to the timely filing of motions is properly before this Court.

II. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY RENDERED ERRONEOUS INSTRUCTIONS TO THE JURY?

Mr. Eisenberg claims that the Court denied his right of Due Process by failing to give two instructions, one relating to adverse publicity and the other differentiating between gross and net income. As is the case in the majority of arguments put forth by the petitioner, the Court is not provided with the benefit of specific citations from the record or substantiation in other form. Respondent again requests the Court, as it will continue to do during the balance of the response, to disregard unsupported and uncited allegations. Petitioner, in fact, failed to incorporate the newspaper article to which he refers, into the record. In Nimmer v. Purtell, 69 Wis.2d 21 230 N.W.2d. 258 (1975), the Court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record in that action was made of the final arguments, however, and the Court stated at P. 40,

> ". . .with no record this Court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absence of showing somewhere in the record the Court cannot consider the alleged error." Borowske

v. Integrity Mutual Ins. Co., (1963) 20 Wis.2d. 93, 98, 121 N.W.2d 287 Purtell, 69 Wis.2d. at 40, 230 N.W.2d at 268.

A search of the record reveals that petitioner failed to request either a curative instruction for any potential resultant harm from the noted article, or any final instruction regarding the article itself. No objection was lodged during the instruction conference with respect to form, additions or omissions. At the instruction conference the Court and respective counsel had the following colloquy:

> "THE COURT: Gentlemen, I have previously given you the proposed instructions as it relates to the negligence and damages. Mr. Derzon do you have any objections to the form of those instructions?"
>
> "MR. DERZON: No Sir."
>
> "THE COURT: Mr. McCann, do you?"
>
> "MR. McCANN: No." (R. 12/4/79, 148-9).

The Court properly voir dired the jury with respect to the article and was satisfied that the article would not play a part in their deliberations and verdict. (R. 12/5/79, 11-13).

No motion for mistrial was sought by petitioner but rather an objection was delib-

erately waived; "[we] don't want to move for a mistrial." (R. 12/5/79, 9).

The Wisconsin Court of Appeals ruled, in reliance upon Micke v. Jack Walters and Sons Corp., 70 Wis.2d 388, 392 234 N.W.2d. 347, 349 (1975), and Grinley v. Eau Galle, 274 Wis. 177 79 N.W.2d. 797 (1956) that:

> "there is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury, therefore, error cannot be predicated upon the omission."

The Court further noted:

> "when instructions are incomplete and do not cover a point that ought to be covered this Court will not reverse unless a timely request for appropriate instructions has been made to the Court." Grinley v. Eau Galle, 274 Wis. 177, 79 N.W.2d. 797-798, (1956) (A. 5).

Petitioner's failure to object to instructions or to request instructions, or to move for mistrial waived any theoretical error.

The contention that the jury was erroneously instructed with respect to gross and net income is answered, ironically, in Mr. Eisenberg's caption on P. 36 of his Petition for Writ of

Certiorari,

> "NO INSTRUCTION WAS SUBMITTED REGARDING THE DEFENDANT'S GROSS INCOME AS OPPOSED TO THE DEFENDANT'S NET INCOME."

The Court of Appeals stated in part at P.6-7 of its decision in quoting Lipinski v. Paculski, 62 Wis.2d 629, 633-634, 215 N.W.2d. 468, 471 (1974),

> "After the jury was instructed the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated they were satisfied with the instructions as given. Under these circumstances an appellant is precluded on appeal from arguing that other additional instructions should have been given." (A. 6-7)

The Court again held that petitioner's failure to request and/or object to instructions constituted waiver of any alleged error (A.7). Substantively, there was no basis for differentiating between gross and net income as the gross income was brought out through questioning of petitioner.

"MR. MELNICK:

Q. I show you what has been marked as Plaintiff's Ex. 16 which purports to be the tax return of Eisenberg's subsidiaries and ask you doesn't the gross receipts show $913,076.71?

A. It is not from law practice." (R.12/4/79,9)

The then defendant did not object to the admission of the tax return into evidence. (R. 12/4/79, 11). Accordingly, the Court did not err in its instructions with respect to income.

The petitioner has never propounded the instruction issue in constitutional dimensions until the instant Petition for Writ of Certiorari, "To preserve a right to appeal one must first raise the issue in the Trial Court." (A. 3), Terpstera v. Soil Test Inc., 63 Wis.2d. at 594. This Court must not, as was argued earlier, consistent with Shelley v. Kraemer, Mich. & Mo., 334 U.S.1; State Farm Mutual Auto Ins. Co. v. Duel, 324 U.S. 437; State v. Reinhardt, 444 U.S. 1088 (1979), consider issues of purported constitutional magnitude when raised for the first time on appeal. Neither the Wisconsin Court of Appeals nor the Wisconsin Supreme Court were presented with or reviewed any constitutional challenge. Walters v. City of St. Louis, 349 U.S. 231.

As in Argument I., petitioner has characterized his position as one of constitutional import, without legal argument and supporting

case law. He further fails to demonstrate what, if any, harm he has suffered as a result of the Court's alleged misdeeds. Mr. Eisenberg has simply created a hypothetical issue which is unsupported in law and in fact. Ashbury Hospital v. Cass County, N.D., 326 U.S. 207; U.S. Fidelity & Guaranty Co. v. State of Oklahoma, 250 U.S. 11.

Any error in instructions to the jury does not constitute a Due Process denial when the proceedings below were before a "duly constituted tribunal in accordance with the law of the state in which the hearing was had and when there was a full opportunity to be heard." Backus v. 4th Street Union Depot Co., 169 U.S. 557, (1898). Furthermore, Due Process requires that there be notice and an opportunity to be heard. If that has occurred the requirements of the federal constitution have been met and the Supreme Court will not determine whether there has been an erroneous instruction of statute or common law by the Court below. Standard Oil v. Missouri, 224 U.S. 270 (1911). Additionally, even if the Trial Court had committed error in admitting evidence or entering a judgment after

a full hearing there is no denial of Due Process. Jones v. Buffalo Coal and Coke Co., 245 U.S. 328 (1917). The 14th Amendment to the United States Constitution does not stand for the proposition in protecting the right of Due Process that the beneficiary must be free from judicial error. Stein v. New York, 346 U.S. 156 (1953); Beck v. Washington, 369 U.S. 541 (1897).

III. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY RENDERED A VERDICT FORM CONTAINING ASSUMED FACTS IN DISPUTE AND THEREFORE INVADED THE PROVINCE OF THE JURY?

Argument 2 of Mr. Eisenberg's Petition charges that the Court submitted an erroneous special verdict form and thereby denied him his right to Due Process. For the third time, the United States Supreme Court is presented with Petitioner's constitutionally phrased argument without prior review by a lower Court. Petitioner not only failed to raise the due process denial at any time before filing of the instant Petition, but neglected to object at trial, propose alternative verdict forms or challenge the same for any reason. Petitioner

persisted in his failure to so object through post-judgment motions. (A. 13-15).

In a conference in chambers, the Court gave counsel for both sides an opportunity to review the verdict form. The following occurred:

> "THE COURT: Are there any other comments or objections to the proposed form of verdict?"
>
> "MR. DERZON: No Judge, not from the plaintiff."
>
> "THE COURT: How about the defendant. Any other objections, Ray?"
>
> "MR. McCANN: No." (A. 12/4/79, 147)

The Court of Appeals in reliance upon Roach v. Keane, 73 Wis.2d. 524, 535, 243 N.W.2d. 508, 575 (1976) found that waiver barred any consideration of the verdict form.

> "We conclude the appellant is precluded from complaining now about the special verdict form. (A. 8).

Mr. Eisenberg's complaint that the verdict form assumes two separate agreements with respect to legal fees is unfounded. Assuming arguendo that the Court erred in its form of verdict, it cannot be said that it invaded the province of the jury or that the petitioner suffered any prejudice therefrom. It is difficult, by

virtue of petitioner's failure to cite portions of the record, to counterargue specific provisions of the record as it relates to the instant argument. However, no due process right has been impinged upon and accordingly no federal question raised. The petitioner's due process charge is wholly without merit and unsupported in authority or in substance.

IV. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO ADJOURN MOTIONS AFTER VERDICT UNTIL A TRANSCRIPT COULD BE PREPARED?

Petitioner contends that in denying his requested adjournment for post-judgment motions his due process rights were abridged. Nowhere does he cite authority that the Court's discretionary decision constituted error. He further fails to demonstrate how he was harmed other than to nakedly assert a Due Process denial. The Court is again the first tribunal to be faced with suggested constitutional error. Even now as the Court must view petitioner's claim, it has the benefit of no legal authority or demonstration of actual harm. The parties to the post-judgment motions were, to a person,

the same which tried the matter to the jury. How the petitioner was prejudiced and, more importantly, how the Court abused its discretion, remains a mystery throughout Mr. Eisenberg's petition. Mr. Eisenberg must be held to a standard demanding that he demonstrate: 1) That the Court abused its discretion; 2) That it had a prejudicial effect; 3) That as a result of the Court's action the defendant was denied due process of law; and, 4) That the Due Process issue is properly before the Court and is of such import and magnitude as to necessitate certiorari. Upon the foregoing grounds the defendant has failed completely. Shelley v. Kraemer, Mich. & Mo. 334 U.S. 1; Fuller v. Oregon, 417 U.S. 40; Cardinale v. Louisiana 394 U.S. 437. No Due Process rights have been infringed upon as a result of the Trial Court's discretionary decision. Event if the Court had erred in interpreting and applying state and common law, in light of the completed jury determination and in light of the opportunity to be heard, no Due Process denial resulted.

Neblett v. Carpenter, 305 U.S. 297 (1938); Standard Oil Co. v. Missouri, 224 U.S. 270 (1911).

It is not claimed by petitioner that the Court's discretionary act took him by surprise, nor resulted in any actual prejudice. Accordingly, no Due Process denial has occurred. Seaboard Airline R. Co. v. Koennecke, 239 U.S. 352 (1950). A full opportunity was had by all parties to litigate post-judgment motions. Petitioner herein did file post-judgment motions citing 11 different propositions calling for a new trial on the 14th day of January, 1980. (A. 13-15) Petitioner's motions were brought on for argument. On the 7th day of March, 1980, the motions were denied in an Order entered on the 17th day of March, 1980. (A17-18) The Court of Appeals in an Order affirmed by the Supreme Court, (A. 16) properly ruled that the petitioner did not show any "prejudicial" effect due to the transcript not being available to the Trial Court. (A. 8).

V. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE

UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY ALLOWED RESPONDENT'S COUNSEL TO REFER TO PETITIONER AS BEING GUILTY OF MURDER IN THE PRESENCE OF THE JURY?

In Petitioner's argument numbered five (5), not only does Mr. Eisenberg raise a constitutional argument for the first time, but he materially mis-states that which took place during the course of trial. Respondent must again refer the Court to petitioner's failure to raise the substantive issue at trial or through post-conviction motions, from either a constitutional or non-constitutional framework. (A. 13-15)

Petitioner never objected, never moved for mistrial, and never requested a curative instruction. Petitioner's allegation is misleading and erroneous. The claimed charge of:

> "being guilty of murder (Pet.Br. 45) is more appropriately understood by viewing the entire quote from the transcript. Mr. Eisenberg is not the kind to leave a stone (sic) unturned and he is as smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally, [in] the sense only how he conducts his affairs; because, he is smart." (R. 12/5/79, 30-31)

Although no objection was made by Mr. Eisenberg the issue was discussed by the parties as follows:

> "MR. McCANN: You claim at one time Mr. Counsel said what about you?"
>
> "THE DEFENDANT: He said, I was a murderer."
>
> "THE COURT: He didn't say that. He said, Mr. Eisenberg was guilty of murder, not in a literal sense." (R. 12/5/79, 38).

Wisconsin case law is consistent in holding that the failure to object to argument believed to be improper constitutes waiver. Ash v. American Family Mutual Ins. Co., 28 Wis.2d. 597, 118 N.W.2d. 58 (1967); Zweifel v. Milwaukee Automobile Mutual Ins. Co., 28 Wis.2d 249 , 137 N.W.2d 6, (1975).

The Court of Appeals found petitioner's claim of prejudicial closing argument to be "misleading and incorrect." (A. 9). The Court held "[t]he appellant waived any alleged error in the closing argument for a mistrial. (A. 9).

No denial of Due Process meriting federal jurisdiction occurred in the instant action

for several additional reasons. There has been no prejudice demonstrated by the petitioner. The constitutional challenge was never raised prior to the filing of the instant petition. Walters v. City of St. Louis, 349 U.S. 231; Cardinale v. Louisianna, 394 U.S. 437. Furthermore, it must be reiterated that the due process does not guarantee the defendant a trial free from error, assuming a complete and full opportunity to be heard. Worcester Co. Trust Co. v. Riley, 302 U.S. 292 (1937). Petitioner has again presented argument to the Court which is wholly without support in law and in substance from the record. Respondent can only request the Court to disregard such allegations.

VI. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT PURPORTEDLY DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES TESTIFYING AGAINST HIM?

Respondent maintains that Monk v. New Jersey 398 U.S. 71; Cardinale vs. Louisianna, 394 U.S. 437 and State v. Reinhardt, 444 U.S. 1088, preclude review of petitioner's claim

of due process denial for failure to allow pro se cross-examination. The petitioner neglected to preserve the issue now before the Court, in any form, either at trial, or post-trial level. Mr. Eisenberg has most certainly failed to properly present and preserve a federal question for the instant review. The Record of Trial reflects that no request was made by petitioner to permit him to conduct cross-examination, pro se, or in addition to his respective counsels. As was stated in Nimmer v. Purtell, 69 Wis.2d at 40 in the absence of a preserved error on the record a reviewing Court cannot consider an issue on appeal. See also Platta v. Flatley, 68 Wis.2d 47, 227 N.W.2d 898 (1975). Accordingly, the Wisconsin Court of Appeals held "we refuse to consider this issue which is raised for the first time on appeal". (A. 10).

Petitioner was, in fact, represented by two attorneys who had full opportunity to cross-examine each and every witness. There

is no authority cited by petitioner, nor uncovered by respondent, creating a right to cross-examine by both counsel and the party itself. Instead, Mr. Eisenberg cites in his brief the unsupported claim that one of his lawyers, Mr. McCann, did not try the underlying tax case, was hard of hearing, and was in his 80's (Pet.Br., 48). Mr. Crowley, it is alleged, "forced Mr. Eisenberg to sit behind the rail of the Courtroom and permitted no communication." (Pet.Br., 48). Mr. Melnick, it is argued, tried to utilize petitioner's assistance of Mr. McCann, "to distort the factual occurrences at trial." (Pet.Br., 47). Respondent again requests the Court to disregard charges of the "unsworn witness" petitioner.

Petitioner erroneously cites Neider v. Spoehr, 41 Wis.2d 610, 165 N.W.2d 171 (1969) to support his claim. The Neider Court did not consider the rights of a party, as opposed to counsel, to conduct cross-examination. More importantly, Mr. Eisenberg failed to explain that the Neider Court imposed limitations on cross-examination

to be determined at the discretion of the Trial Court.

> "It is equally fundamental that a party has a right to cross-examine witnesses who testify against him. However, this right is not without limitation, and the extent of the manner and even the right of multiple cross-examination by different counsel representing the same party can be controlled by the Trial Court so that the trial proceeds in an orderly and fair manner. The exercise of discretion by the Trial Court to deny or restrict cross-examination must be dependent upon the circumstances of the trial. This Court will not reverse unless it clearly appears that the Trial Court abused its discretion and that the error affected a substantial right of the complaining party and probably affected the result of the trial." (P. 617-18)

The petitioner has shown no prejudice. He has not been denied Due Process, but was, rather, adequately represented by two attorneys. No federal question exists and none is properly before the Court.

Pages 49 through 55 of Petitioner's Brief do not appear to be connected to Argument numbered five (5). It cannot be determined where, if at all, petitioner intended the pages to appear. Accordingly, respondent will only state that the

section noted is almost totally unsupported by citations to the record and merely constitutes a potpourri of unsworn testimony. The jury found no alleged act of malpractice, and no federal question is properly presented to the Court within the confines of pages 49 through 55. The pages cited above attempt to re-try both the tax trial and malpractice action. The Court is presented with a rambling seven page discourse on the alleged ills of George Crowley, the petitioner's former lawyer. It is argued that respondent Crowley violated petitioner's constitutional rights. Mr. Eisenberg does not give the Court or respondent insight with respect to what particular rights were violated. Respondent respectfully requests the Court to disregard pages 49 through 55.

VII. DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO OVERTURN THE JURY VERDICT FINDING NO MALPRACTICE?

In argument seven (7) respondent Crowley is accused of violating petitioner's consti-

tutional rights. The Court must decline petitioner's invitation for certiorari for the following reasons: 1) There is no federal question properly preserved and presented; 2) The issue is raised for the first time in any fashion by Writ of Certiorari; 3) The lower Courts were not presented with such allegation; 4) The petitioner was not acting under color of state law, but, rather was functioning in his capacity as a private citizen. The respondent will not reiterate Wisconsion "waiver" arguments heretofore stated but will incorporate by reference previously cited cases in support thereof. Additionally, respondent will rely upon those cases cited in its argument with respect to the Court's approach to issues not raised in the Court below and with respect to hypothetical and unsupported claims of constitutional infringement.

It should be noted, however, that petitioner erroneously places the obligations and limitations

of the 14th Amendment upon private citizen Crowley. Due process rights cannot be abridged by private citizens. Public Utilities Comm. v. Pollack, 343 U.S. 451, (1951).

Petitioner attempts to again re-argue both the underlying tax and malpractice actions. The Supreme Court will not review a State Court decision which is founded upon independent and adequate State grounds. Henry v. State of Mississippi, 379 U.S. 443; Dixon v. Duffy, 342 U.S. 543 (1951); Young v. Rayin, 337 U.S. 235, (1949).

The jury, in its verdict, considered all properly presented allegations of legal malpractice and found that none existed. Petitioner herein attempts through "unsworn testimony" to discredit the verdict together with the Wisconsin Appellate Court's affirmation. As was stated by the Court of Appeals at p. 10 in its Decision;"§VII of the Appellant's Brief sets forth his version of the facts which he was not able to prove to the satisfaction of the Court or jury." (A. 10) The Trial Court would not disagree with the jury verdict, (A.16)

the Court of Appeals refused to upset the decision, (A. 11), but rather stated in citing Coryell v. Connecticut, 88 Wis.2d 310, 317, 276 N.W.2d 729 (1979). On appeal,

> "the obligation of this Court is to search for credible evidence that will sustain the verdict not for evidence to sustain a verdict jury could have but did not reach."

The unsubstantiated charges by petitioner should be disregarded by the Court and certiorari should be denied with respect to issue numbered seven VII.

VIII. DID THE SUPREME COURT OF THE STATE OF WISCONSIN VIOLATE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WHEN IT REFUSED TO REVIEW THE DECISION OF THE WISCONSIN COURT OF APPEALS, SAID DECISION HAVING BEEN OFFERED BY A JUSTICE AGAINST WHOM PETITIONER FILED A REQUEST FOR SUBSTITUTION?

Petitioner argues in its final contention that Due Process demands an impartial forum, that he filed a timely request for hearing, and that such denial was ignored. Petitioner infers that he had a right to substitution of appellate judge and that he timely filed the same. Wisconsin Statutes governing

substitution of appellate judges, §801.58, does not provide for a substitution of appellate judge nor even for a motion for recusal, (A. 19) Mr. Eisenberg has stated in his brief at p. 62 that his request was for substitution and not recusal. What petitioner has failed to demonstrate is: 1) How a substitution is constitutionally protected; 2) What prejudices he suffered as a result of such denial of constitutional rights; 3) How his request for substitution was provided for by statute or common law; and, 4) How the ruling by the Court of Appeals was from an impartial tribunal.

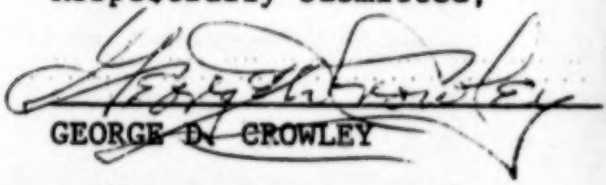
Argument VIII suffers the same infirmities as those in I through VII, to-wit: 1) A failure to preserve the issue in the Court below; 2) A failure to state a federal question; and, 3) A failure to cite the appropriate record provisions and legal authorities. Respondent incorporates by reference arguments previously made on the above issues and respectfully requests

the Court to deny petitioner's request for certiorari.

CONCLUSION

For all the reasons, as stated above, respondent maintains that petitioner has failed to demonstrate any federal question which would allow the Court to review and grant relief and accordingly respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



GEORGE D. CROWLEY

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APPENDIX

Decision of the Court of Appeals of the State of Wisconsin, July 21, 1981	A1-12
Petitioner's Post Judgment Motions	A13-15
Decision of the Supreme Court of Wisconsin, December 7, 1981	A16
Order for Judgment dated March 17, 1980	A17-18
Wisconsin Statute - Section 801.58	A19

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUL 21 1981

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62 (1).

No. 80-737

NOTICE
This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

GEORGE D. CROWLEY,

Plaintiff-Respondent,

v.

SYDNEY M. EISENBERG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES P. FIEDLER, Judge. Affirmed.

Before Decker, C.J., Cannon, J., and Hanley, Reserve Judge.

HANLEY, Reserve Judge. This appeal arises out of an action commenced by George D. Crowley (respondent herein), to recover attorney's fees owing from his representation of Sydney M. Eisenberg (appellant herein), in a federal criminal trial where it was found that Mr. Eisenberg was guilty of three counts of willfully filing a false income tax return. Mr. Eisenberg countercialmed against Mr. Crowley for legal malpractice.

On December 5, 1979, a jury found for Mr. Crowley on his claim for attorney's fees, and against Mr. Eisenberg on the malpractice counterclaim.

After hearing motions after verdict, the trial judge ruled that there was credible evidence to support the verdict answers, with the exception of the answer to question 1a, regarding the amount owed by Mr. Eisenberg for Mr. Crowley's legal services, which was amended by stipulation from $10,000 to $7,000. Judgment was ordered against Mr. Eisenberg on March 17, 1980. The counterclaim was dismissed on the merits. Mr. Eisenberg appeals.

The following issues are presented on this appeal:

1. Were the motions after verdict timely filed by the respondent in his defense of the appellant in the criminal case?
2. Were the instructions submitted by the trial court to the jury erroneous?
3. Was the special verdict submitted to the jury erroneous?
4. Did the trial court err in refusing to adjourn the motions after verdict until a transcript had been prepared?
5. Did the trial court err in not ordering a new trial based on an improper closing argument by respondent's counsel?
6. Did the trial court err in refusing to allow the appellant to conduct his own cross-examination?

7. Is there any credible evidence to support the verdict of the jury in its finding that the respondent was not negligent in his representation of the appellant?

Timeliness of Motions

Appellant contends that the trial court erred in ruling, as a matter of law, that respondent's motions after verdict, on behalf of appellant in his criminal trial, were timely filed.

Although the appellant raised eleven separate issues in his post-trial motions, the issue of the appropriateness of the trial court's ruling on the timeliness of respondent's motions after verdict was never raised.

The Wisconsin Supreme Court has consistently held that to preserve a right to appeal, one must first raise the issue in the trial court. The burden is upon the party that alleges error to establish in the record that the error was specifically called to the attention of the trial court. A failure to make a timely objection constitutes a waiver of the objection. Terpstra v. Soiltest, Inc., 63 Wis.2d 585, 594, 218 N.W.2d 129, 134 (1974).

Pursuant to the above authority we hold that the issue is not properly before this court.

Instruction Regarding Newspaper Article

The appellant has alleged that the jury was not properly instructed regarding a newspaper article concerning him which appeared in The Milwaukee Journal during the course of the trial. However, he has failed to incorporate the article in the record on this appeal. He is requesting the court to overturn a jury verdict and a decision of the trial court without submitting the article to the court.

In Nimmer v. Purtell, 69 Wis.2d 21, 230 N.W.2d 258 (1975), the court considered the contention of a party that opposing counsel had made an improper argument to the jury. No record was made of the final arguments, however, and the court stated:

> [W]ith no record this court cannot determine whose recollection of what was said is correct. The rule in Wisconsin is that absent some showing somewhere in the record, the court cannot consider the alleged error. Borowske v. Integrity Mut. Ins. Co., (1963) 20 Wis.2d 93, 98, 121 N.W.2d 287. Purtell, 69 Wis.2d at 40, 230 N.W.2d at 268.

The appellant made no request for any instruction regarding the newspaper article. He made no suggestion to the trial court other than to ask the jury if they had read the article and to instruct that they pay no attention to it.

The court did question the jury and nine members stated that they had read the article. On individual questioning by the trial

court, all nine responded that they could put the article out of their minds in reaching a verdict.

If the appellant wanted anything additional, he should have requested it at the time. If he felt that the article was damaging and the poll of the jury insufficient, he should have made an objection and moved for a mistrial. He elected to take his chances on a jury verdict.

In Micke v. Jack Walters & Sons Corp., 70 Wis.2d 388, 392, 234 N.W.2d 347, 349 (1975), the court stated:

> There is no evidence or indication in this record that the defendant corporation requested such specific instruction when the case was submitted to the jury. Therefore error cannot be predicated upon the omission. As this court has held: "Where instructions are incomplete, and do not cover a point that ought to be covered, this court will not reverse unless a timely request for appropriate instructions has been made to the trial court." (Quoting Grinley v. Eau Galle, 274 Wis. 177, 179, 79 N.W.2d 797, 798 (1956)).

Here an instruction conference was held by the court in chambers, and the proposed jury instructions were approved by counsel for the parties.

We conclude that appellant's failure to object to the instructions precludes him from raising an objection to the instruction on this appeal.

The appellant also argued that the jury was not properly instructed on the difference between his gross income and his net income. Defendant's income record was a factor in establishing his damages.

Appellant himself, through the questioning of his attorney, referred to his 1975 income tax return.

He was then questioned by respondent's attorney, Mr. Melnick:

> Q I show you what has been marked as plaintiff's exhibit 16, which purports to be the tax return of Eisenberg subsidiaries and ask you doesn't the gross receipt show nine hundred thousand seventy six dollars and seventy one cents?
>
> A It is not from law practice.

The return was admitted into evidence without objection. At no time was a motion for a mistrial made. Appellant also failed to submit an instruction to the court. In ruling on a similar issue in Lipinski v. Pakulski, 62 Wis. 628, 633-34, 215 N.W.2d 468, 471 (1974), the court said:

> After the jury was instructed, the trial judge asked the lawyers for both plaintiff and defendant whether they had any corrections to make or whether there had been any omissions. Both stated that they were satisfied with the instructions as given.
>
> Under these circumstances, an appellant is precluded on appeal from arguing that other additional instructions should have been given. The instructions

that were given were not erroneous. Even under the plaintiff's theory of the case, the most that could be said is that they were incomplete. We have however, repeatedly stated:

"Where instructions are incomplete and do not cover a point that ought to be covered, this court will not reverse unless timely request for appropriate instructions has been made to the trial court. Grinley v. Eau Galle, (1956), 274 Wis. 177, 79 N.W.2d 787." Carson v. Pope, (1961), 15 Wis.2d 300, 306, 112 N.W.2d 693 [,696.]

We hold that the appellant waived any alleged error in the trial court's instructions to the jury by not objecting to the instructions given or offering his own additional instructions.

Form of Special Verdict

Appellant contends that the form of the special verdict was erroneous. Neither at the time the special verdict was presented to counsel nor in his motions after verdict did the appellant raise the issue he raises on appeal. Both attorneys for the parties agreed with the court on the form of the special verdict as submitted to the jury.

In Roach v. Keene, 73 Wis.2d 524, 243 N.W.2d 508 (1976), the court was faced with an almost identical situation. There the appellant also failed to object to the special verdict before it was submitted to the jury, and neglected to raise the issue on motions after verdict. The court held that under these circumstances, there can be

no question that the defendant is not entitled to assert error on appeal. Id. at 535, 243 N.W.2d at 515.

We conclude the appellant is precluded from complaining now about the special verdict form.

Adjournment of Motions After Verdict

Appellant asserts that the trial court abused its discretion in failing to adjourn the post-trial motions until a transcript could be completed. However, he fails to show with any degree of specificity what particular error the trial judge made in ruling on the post-trial motions because a transcript was not available to him at that time.

Appellant has not shown any prejudicial effect due to the transcript not being available to the trial court. Appellant has not asked for any particular relief in his brief because of this alleged error.

Under the circumstances we conclude that the trial court did not abuse its discretion in refusing to adjourn the motions after verdict until the transcript was available.

Closing Argument of Counsel

The appellant claims that counsel for the respondent, in his

closing argument, referred to appellant as "being guilty of murder." The claim is misleading and incorrect. The record discloses that respondent's counsel, in his closing argument, stated to the jury:

> Mr. Eisenberg is not the kind to leave a stove [sic] unturned and he is smart as they come; and he has built an empire on the basis of that intelligence and he has gotten away with murder in a sense, not literally [i]n the sense only how he conducts his affairs; because, he is smart. Transcript of December 5, 1979 at 30-31.

At no time was any objection or a motion for a mistrial made by the appellant.

In Zweifel v. Milwaukee Automobile Mutual Insurance Co., 28 Wis.2d 249, 256, 137 N.W.2d 6, 11 (1965), the court held that if particular arguments were thought improper, it was incumbent upon counsel to move for a mistrial before the jury returned its verdict or else the complaint was deemed waived.

We hold the appellant waived any alleged error in the closing argument by failing to move for a mistrial.

Cross-Examination of Witnesses

The appellant now, for the first time, has raised an issue of whether it was error for the trial court to deny him an opportunity to cross-examine witnesses.

There is nothing in the record indicating that a request was made to the trial court to permit appellant to conduct cross-examination. His attorney, Mr. McCann, was allowed to cross-examine witnesses. Appellant has cited no authority that both a party and his attorney can conduct cross-examination.

The absence of a request to the court on the record and the absence of this issue on motions after verdict are fatal to the appellant. As the court said in Platta v. Fistley, 68 Wis.2d 47, 63, 227 N.W.2d 898, 907 (1975): "The plaintiff alleges prejudicial error on the part of the trial court in not permitting the plaintiff to pursue certain lines of cross-examination. Not only are the plaintiff's allegations of error unclear but they are not raised on posttrial motions. The objection comes too late."

We refuse to consider this issue which is raised for the first time on appeal.

Question of Credible Evidence

Section VII of the appellant's brief sets forth his version of the facts which he was not able to prove to the satisfaction of the court or jury.

Both Mr. Crowley and Mr. Manning testified about the trial strategy, the facts underlying the jury waiver by appellant, and the decision not to call appellant as a witness.

The appellant has not presented a proper issue for appeal in this section. All of his contentions were controverted by respondent's experts. His experts were controverted by respondent's experts. The standard for overturning a jury verdict on a factual question is well established. In Meurer v. ITT General Controls, 90 Wis.2d 438, 450-51, 280 N.W.2d 156, 162-63 (1979), the court said:

> The standard of review of a jury verdict is that it will not be upset if there is any credible evidence to support it. The evidence will be viewed in the light most favorable to the verdict. May v. Skelley Oil Co., 83 Wis.2d 30, 35, 264 N.W.2d 574 (1978); Nelson v. Travelers Ins. Co., 80 Wis.2d 272, 282, 283, 259 N.W.2d 48 (1977). This is especially true where, as here, the verdict has the approval of the trial court. Upton v. Tetro, 68 Wis.2d 562, 570, 229 N.W.2d 691 (1975). The credibility of witnesses and the weight given to their testimony are left to the judgment of the jury, and where more than one reasonable inference can be drawn from the evidence, this court must accept the inference drawn by the jury. Roach v. Keane, 73 Wis.2d 524, 536, 243 N.W.2d 508 (1976). On appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach. Coryell v. Conn, 88 Wis.2d 310, 317, 276 N.W.2d 723 (1979).

Under the above standards of review we are satisfied that there is ample credible evidence to support the verdict of the jury in

its finding that the respondent was not negligent in his representation of the appellant in the tax case. The judgment is correct and must be affirmed.

By the Court.--Judgment affirmed.

Recommendation: Not recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COUET MILWAUKEE COUNTY

GEORGE D. CROWLEY

Plaintiff

vs.

Case No. 455-500

SYDNEY M. EISENBERG

Defendant

The defendant moves the Court above named for Judgment of Dismissal of the plaintiff's Complaint on its merits notwithstanding the verdict of the jury, and for judgment in favor of the defendant on his Counterclaim for the least amount an impartial jury could assess because the verdict is contrary to law and to evidence.

In the event the foregoing Motion is denied the defendant moves the Court for a new trial for the following reasons:

a. Because of passion, prejudice and perversity on the part of the jury.

b. In the interests of justice.

c. Because of improper argument and improper conduct by the plaintiff's counsel, as well as prejudicial and improper remarks.

d. Because the jury's answers to the questions bore no relationship to proof offered at the trial.

e. Because of errors by the Court in not striking from the record testimony improperly submitted to the court and the jury; as an example, the counsel for the plaintiff improperly took from an income tax return the figure of $900,000.00 on a yearly tax return indicating improperly and wrongfully informingthe jury that the defendant had earned $900,000.00 in one year, said representation being completely false insofar as the net income was concerned. The Court has indicated

that he would instruct the jury with reference to an agreed net amount lost by the defendant from his law practice, namely $14,000.00 per year, thus explaining away the $900,000.00 figure which undoubtedly inflamed the jury. The Court failed to do so, and, further, there was other evidence improperly presented to the jury.

f. Misconduct on the part of the counsel for the plaintiff with respect to facial grimaces to the jury, and other misconduct on his part with reference to the trial of the case.

g. Error by the Court in submitting instructions to the jury prior to the presentation of the respective cases which became even more significant because of the length of the trial.

h. Errors in instructions to the jury.

i. Counsel for the plaintiff specifically informed the jury that defendant was a "murderer."

j. Permitted the trial to the jury to continue to sit in face of adverse newspaper publicity at or about the conclusion of the testimony, most of the jury admitted on the record they saw the adverse article; the defendant was not provided with an opportunity to question the jurors as to the effect on the jury, such questions being unnecessary in any event because of the nature of the adverse and prejudicial article.

k. The Court erred in unreasonably limiting the expert witnesses during the court trial after some of the expert witnesses had testified; the defendant had available additional expert witnesses whose testimony would have substantially assisted in the defense and with the Counterclaim of the defendant.

In the alternative, the defendant moves that the answers to the questions of theverdict be modified and changed to conform with the

evidence both to the Complaint and the Counterclaim; in the further alternative, with respect to the Counterclaim of the defendant, defendant moves that the plaintiff be found negligent as a matter of law, because of the following reasons:

a. The plaintiff did not interview available witnesses.

b. The plaintiff waived a jury at a pre-trial conference without the permission of the defendant, thus making any subsequent waiver by him a severe testing of his credibility by the judge.

c. Failure by plaintiff to permit the defendant to testify and failure to procure for testimony the many witnesses who had a substantative defense for defendant at the Tax Criminal trial. All of same were available for testimony but not one was called to testify on behalf of the defendant.

Dated this 14th day of January, 1980.

Ray T McCann

RAY T. McCANN
Attorney for Defendant

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

David A. Malnick
Jacobson, Sodos, Malnick & Krings
152 West Wisconsin Ave.
Milwaukee, WI 53203

Sydney M. Eisenberg
1131 West State St.
Milwaukee, WI 53233

To

Ray T. McCann
152 West Wisconsin Ave.
Milwaukee, WI 53233

Madison, December 7, 1981

Hon. James P. Fiedler
Circuit Court of Iowa County
County Courthouse
Dodgeville, WI 53533

The Court today announced an order in your case as follows:

No. 80-737 Crowley v. Eisenberg

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Sydney M. Eisenberg, and considered by the court,

IT IS ORDERED that the petition is denied, without costs.

MARILYN L. GRAVES

Clerk of Supreme Court

SC-105

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

GEORGE D. CROWLEY,

Plaintiff,

-vs-

SYDNEY M. EISENBERG,

Defendant.

ORDER FOR JUDGMENT

CASE NO. 455-500

The above captioned matter having come on for jury trial on the 26th day of November, 1979, and the jury having rendered it's verdict on the 5th day of December, 1979; counsel for the parties having prepared and filed their respective motions after verdict, and having appeared for oral arguments on the 7th day of March, 1980, the plaintiff appearing by his attorneys, Jacobson, Sodos, Melnick and Krings, S.C., by David Melnick and Alan Derson, the defendant appearing by his attorney, Ray T. McCann; and the Court having heard argument, considered the evidence offered at the trial herein, and determined that there was credible evidence in the record to support the verdict answers with the exception of the answer to Question 1a which has been amended by the stipulation of counsel from Ten Thousand Dollars ($10,000.00) to Seven Thousand Dollars ($7,000.00),

NOW THEREFORE, upon all the records, files and proceedings herein,

IT IS ORDERED:

1. That the plaintiff be granted judgment against the defendant in the sum of Fourteen Thousand Eight Hundred and Thirty-Eight Dollars ($14,838.00) with interest thereon at the rate of 7% per annum together with their costs and disbursements.
2. That the counterclaim of the defendant against the plaintiff shall be dismissed upon the merits.

Let judgment be entered accordingly.

Dated this 17 day of March, 1980.

BY THE COURT:

James P. Fiedler,
Circuit Court Judge

801.58 Substitution of judge. (1) Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

(2) After the written request has been filed, the named judge shall have no further jurisdiction in the action or proceeding except that the judge shall determine if the request is correct as to form and timely filed. If the request is correct as to form and timely filed, the named judge shall be disqualified and shall promptly request assignment of another judge under s. 751.03. The newly assigned judge shall proceed under s. 802.10.

(3) Except as provided in sub. (7), no party may file more than one such written request in any one action, nor may any single such request name more than one judge. For purposes of this subsection parties united in interest and pleading together shall be considered as a single party, but the consent of all such parties is not needed for the filing by one of such party of a written request.

(4) Upon the filing of an agreement signed by all parties to a civil action or proceeding, by the original judge for which a substitution of a new judge has been made, and by the new judge, the civil action or proceeding and pertinent records shall be transferred back to the original judge.

(5) In addition to other substitution of judge procedures, in probate matters a party may file a written request specifically stating the issue in a probate proceeding for which a request for substitution of a new judge has been made. The judge shall thereupon be substituted in relation to that issue but after resolution of the issue shall continue with the administration of the estate. If a person wishes to file a written request for substitution of a new judge for the entire proceeding, subs. (1) to (4) shall apply.

(6) (a) In probate matters ss. 801.59 to 801.62 apply, except that upon the substitution of any judge, the case shall be referred to the register in probate, who shall request assignment of another judge under s. 751.03 to attend and hold court in such matter.

(b) Ex parte orders, letters, bonds, petitions and affidavits may be presented to the assigned judge, by mail or in person, for signing or approving, wherever the judge may be holding court, who shall execute or approve the same and forthwith transmit the same to the attorney who presented it, for filing with the circuit court of the county where the records and files of the matter are kept.

(7) If upon an appeal from a judgment or order or upon a writ of error the appellate court orders a new trial or reverses or modifies the judgment or order as to any or all of the parties in a manner such that further proceedings in the trial court are necessary, any party may file a request under sub. (1) within 20 days after the entry of the judgment or decision of the appellate court whether or not another request was filed prior to the time the appeal or writ of error was taken.

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